

SENATE ETHICS COMMITTEE

ETHICS ADVISORY OPINION NO. S94-1

Before the legislative session began, a member of the senate requested an advisory opinion from the Legislative Ethics Committee. That committee did not meet in the remainder of the 1993 interim. Pursuant to Senate Rule 9-13-2, the request was forwarded to the Senate Ethics Committee.

The request explained that every year shortly before a legislative session, the senator mails questionnaires to every registered voter in his¹ district. The purpose of the questionnaires is to "help gauge [the] district's sentiment on the major issues [the senator] believe[s] will come before the legislature." The senator added that each questionnaire "usually contains a brief message from [the senator] as well as some basic information about state government." A copy of a questionnaire was not included with the request for this opinion.

Producing and mailing the questionnaire typically costs up to \$2,000, which apparently is paid from the senator's personal funds. The questionnaire apparently states that donations from questionnaire respondents to defray the costs are appreciated. Reportedly, it is not unusual to receive about \$300-\$400.

The senator asks the following three questions:

- "1. Am I required, either by statute or rule, to use campaign contributions to cover any of the costs in producing and distributing my questionnaire?
2. Are there any circumstances under which I would be required to report the costs of producing and distributing the questionnaire as a campaign expense?
3. Are there any other ethical questions I should consider on this matter?"

This advisory opinion responds to those questions.

1. The use of the masculine pronoun "his" is strictly for grammatical convention. It does not indicate the gender of the senator making the request.

The answers depend on the precise nature of the questionnaire. Since a copy of a questionnaire was not included with the request for this opinion, we will offer some general guidelines that may be helpful to any senator in similar circumstances.

A threshold issue is whether the costs in producing the questionnaire qualify as an "expenditure" under the Campaign Reporting Act. Subsection H of Section 1-19-26 NMSA 1978 of that act defines an expenditure as a payment or promise to pay "any money or other thing of value for a political purpose." A "political purpose" is defined in Subsection J of Section 1-19-26 NMSA 1978 as "influencing or attempting to influence an election"

The initial question, therefore, that the inquiry raises is whether a questionnaire influences or attempts to influence an election. This is not an easy question to answer in the abstract. It depends, we believe, on the precise nature of the questions asked and the totality of the circumstances that surround the questionnaire.

For example, if the questionnaire is included in a packet that contains re-election slogans or statements urging readers to vote for the senator in an election, the costs for the questionnaire would be an expenditure that would have to comply with all the requirements set forth in the Campaign Reporting Act. On the other hand, if the questionnaire assiduously avoids any reference to an election; if the questions posed are strictly objective and do not seek to elicit support for or attempt to influence an election; and if the questionnaire is not mailed reasonably close to the time of an election, then the costs for the questionnaire would not appear to be expenditures within the meaning of the Campaign Reporting Act.

It is necessary, therefore, to consider the facts of each questionnaire and the circumstances surrounding it, including any "brief message" from the senator that accompanies a questionnaire, before reaching a determination on whether the questionnaire's costs are an "expenditure" that must be governed by the provisions of the Campaign Reporting Act. It is likewise these same facts and circumstances that will determine the appropriate answers to the first two questions raised.

Further complications could arise depending upon subsequent use of the answers to the questionnaire. If, for example, at some future date the senator or someone else uses any of the information gathered from the questionnaire to craft campaign strategy for an election, the costs of the questionnaire could be considered a campaign expense or contribution, depending on who uses them. The questionnaire responses could, in those circumstances, be considered a "thing of value for a political purpose" that must be reported. See Subsection H of Section 1-19-25 NMSA 1978.

The final question is whether there are any other general ethical questions to consider regarding this matter. We believe all senators are well aware of the prohibition in our ethics reform law against soliciting a contribution for a political purpose during the prohibited period immediately before and during a legislative session. See Section 1-19-34.1 NMSA 1978. The senator making this request has stated that the questionnaires are mailed annually "shortly before the legislative session." If, however, they are mailed after January 1; if they are an attempt to influence an election; and if contributions are solicited to defray the questionnaire's costs, then the mailing of the questionnaires would be prohibited.

A related ethical consideration that a senator may want to consider concerns the timing of the mailing if the questionnaires are in fact attempting to influence an election. Even if the mailing date is before January 1, the closer the mailing date gets to January 1, the more likely it is the contributions made can only be received after January 1. These circumstances make it more likely that there will be an appearance that one is complying with the letter but not the spirit of the provision that seeks to prohibit campaign solicitations between January 1 and adjournment of the legislative session.

On behalf of the Senate Ethics Committee, we appreciate all senators' sensitivity to ethical questions. We hope this response offers helpful guidelines.

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Chairman, Senate Ethics
Committee

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